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STATE OF WASHINGTON

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BY RONALD R. CARPENTER

NO. 84691-0

SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

SEATTLE TIMES COMPANY,  
a Delaware corporation,

Petitioner,

v.

THE HONORABLE SUSAN K.  
SERKO, Judge of the Superior Court,  
Pierce County; and THE HONORABLE  
BRYAN E. CHUSCHCOFF, Judge of  
the Superior Court, Pierce County,

Respondents.

JUDGES' RESPONSE  
TO PETITION FOR  
WRIT OF MANDAMUS  
AND MOTION FOR  
ACCELERATED  
REVIEW

In response to the Petition filed herein, and in response to the  
Petitioner's Motion for Accelerated Review, the Respondents, Susan K.  
Serko and Bryan E. Chushcoff,<sup>1</sup> judges of the Pierce County Superior Court,  
assert as follows:

1. The Petition herein should be dismissed as an improper attempt  
to obtain appellate review of judicial decisions made in other  
cases.
2. The Respondent judges are not proper parties to this litigation.

<sup>1</sup> Judge Chushcoff's name is misspelled in the Petition and in several other  
documents filed in this matter.

FILED AS  
ATTACHMENT TO EMAIL

ORIGINAL

3. Except to confirm that the Respondents are duly elected judges of the Superior Court for Pierce County, and that the Petition attaches various court documents that are matters of public record, the Respondent judges take no position as to the remaining allegations in the Petition.
4. The Respondent judges take no position on the Motion for Accelerated Review.

## **MEMORANDUM**

### **Introduction**

This is an action in the form of a writ of mandamus. The Petitioner is the Seattle Times Company, the publisher of several newspapers. The named Respondents are two judges of the Pierce County Superior Court, Susan K. Serko and Bryan E. Chushcoff. The stated purpose of the Petition is to allow public access to police incident reports and other public records relating to the shooting of four Lakewood police officers. Judges Serko and Chushcoff are named as Respondents because they signed orders restricting access to certain records based on motions filed in several criminal cases currently pending in Pierce County Superior Court. The Respondent judges are not the custodians of the records in question, nor is it alleged that they

have participated in any way other than to perform their judicial function in ruling on motions in cases pending in their court.

The Petitioner has apparently named no Respondents other than the judges, although the Petitioner has given notice of this proceeding to a variety of parties, including the Pierce County Prosecuting Attorney, the attorneys for the defendants in the criminal cases, and other parties who filed public records requests relating to the records at issue.

**A. This case is an attempt to obtain appellate review of rulings in other cases pending in the superior court, and is not appropriate for the exercise of this Court's original jurisdiction.**

Although this case is filed in the form of an original action against state officers, seeking a writ of mandamus, the contents of the Petition make it clear that this Petitioner is actually seeking review of judicial acts of the Respondent judges in other cases now pending in the superior court. The Petitioner objects to an order entered by Judge Serko on May 20, 2010, in several criminal cases pending in Pierce County, attached as Exhibit A to the Petition, and to an order entered by Judge Chushcoff on June 9, 2010, in another criminal case also pending in Pierce County and attached as Exhibit B to the Petition.<sup>2</sup> Pet., ¶¶ 1-3 (pp. 1-2). In defining the relief requested, the

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<sup>2</sup> For ease of reference, the two Orders are also attached to this Response as Exhibits A and B. Judge Serko's Order is issued in seven criminal cases pending in Pierce County Superior Court (see caption of Exhibit A), and Judge Chushcoff's Order

Petition asserts that “the May 20 and June 9 Orders pose an ongoing injury” to the Petitioner’s right to obtain public records. Pet., ¶ 38 (p. 19). The Petitioner seeks a writ of mandamus “compelling Respondents to allow public access” to the records in question. Pet., ¶ 39 (p. 20).

It would be impossible to grant the relief requested without superseding, vacating, or significantly modifying the Orders entered by the Respondents in the criminal cases. Therefore, this case is, unavoidably, a challenge to the Orders entered by Respondents in other cases, and a request that this Court review those orders and instruct the Respondents to vacate or modify them.

The use of writs of mandamus or other extraordinary writs to seek review of trial court decisions has been superseded by the procedures set forth in the Rules of Appellate Procedure. RAP 2.1(b). *See, e.g., Kreidler v. Eikenberry*, 111 Wn.2d 828, 838-39, 766 P.2d 438 (1989) (writs superseded by statute and rule); *State v. G.A.H.*, 133 Wn. App. 567, 576, 137 P.3d 66 (2006) (RAP 2.1 abolishes use of writs in favor of direct appeals and motions for discretionary review).

The Orders in question are the result of proceedings conducted in the superior court in several cases pending in that court. The May 20

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relates to exhibits admitted in *State v. Clemmons*, Pierce County No. 09-1-05523-0 (*see* caption of Exhibit B).

Order makes it clear that the Seattle Times, the Petitioner here, submitted briefing and participated fully in the proceedings. Ex. A, at 2.<sup>3</sup> A party aggrieved by the superior court's rulings can seek appellate review by filing either an appeal under RAP 2.2 or a motion for discretionary review under RAP 2.3. Since none of the criminal cases are concluded, the presumable procedure would be a motion under RAP 2.3(a), which provides that "[u]nless otherwise prohibited by statute or court rule, a party may seek discretionary review of any act of the superior court not appealable as a matter of right."

By contrast, RAP 16 defines the procedure for petitions against state officers for "writs of mandamus, prohibition, quo warranto, and similar writs, *but only when the proceeding is started for the first time in the Supreme Court.*" RAP 16.1 (italics added). Considering that the entire Petition herein consists of a discussion of orders entered in other cases by the superior court, and requesting relief from the effects of those orders, it would be disingenuous to label this case a proceeding started for the first time in the Supreme Court. Furthermore, as discussed below, appellate review of the superior court decisions allows full participation in this proceeding by those who argued it in the trial court, and avoids the anomalous situation of casting

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<sup>3</sup> Exhibits F, I, and J to the Petition are all briefing filed in the criminal proceedings by the Seattle Times.

the trial court judges in the role of advocates defending rulings they have made in separate litigation.

**B. *Seattle Times Co. v. Ishikawa* is distinguishable from this case.**

The Petitioner apparently casts this case in the form of a petition for a writ of mandamus based on the notion that this case is analogous to *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), in which this Court entertained and decided the case based on an original writ proceeding naming a superior court judge as the respondent. The Court stated that “[m]andamus by an original action in this court is the proper form of action for third party challenges to closure orders in criminal proceedings.” *Id.*, at 35, citing *State v. Bianchi*, 92 Wn.2d 91, 593 P.2d 1330 (1979) and *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 615 P.2d 440 (1980).

There are good reasons not to extend this holding in *Ishikawa* to the facts of the present case. *Ishikawa* was not a public records act case, but a dispute over the propriety of an order closing a pretrial hearing in a criminal case and sealing the records reflecting what had happened in the hearing. *Bianchi* and *Kurtz* made it clear that the Seattle Times had no authority to intervene in the criminal case or to seek review of the superior court decision through an appeal or motion for review. Thus, there was no way for the Times to raise the issue except by starting separate litigation.

The important difference between *Ishikawa* and this case is that this is not a “pure” attempt by a non-party to review how a superior court judge managed a criminal case, but rather a dispute occasioned by the Petitioner’s request to examine certain records maintained by the Pierce County Sheriff’s Office (PCSO). Pet., ¶¶ 13-14 (p. 5). *See also* Pet. Ex. D. The parties who objected to disclosure could potentially have brought a civil action joining the Seattle Times and other requesters of public records, but they chose to assert their claims in the context of their criminal prosecutions because their claim was that disclosure would harm their ability to adequately defend against the criminal charges. *See* Pet. Ex. E, which includes copies of several of the motions and supporting memoranda.

As noted earlier, the Petitioner Seattle Times submitted briefing and fully participated in the proceedings leading to the May 20 Order.<sup>4</sup> Whether or not the Petitioner had “party” status in the criminal case, the Petitioner clearly had an interest in the proceedings that seems sufficient to permit the Times to seek appellate review of a decision adjudicating the Petitioner’s rights under the PRA. *See, e.g., Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004), in which the Seattle Times petitioned successfully for intervention and appellate review of the sealing of records in a civil case to

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<sup>4</sup> Recent case law suggests that a public records requester is a necessary party to litigation seeking to block release of records requested. *Burt v. Wash. State Dep’t of Corr.*, \_\_\_ Wn.2d \_\_\_, 231 P.3d 191 (2010).

which the Times was not otherwise a party. Given this Court's repeated recognition of the public's right to open and accessible court proceedings and of open access to public records, it may be time to re-examine the doctrinaire position, taken several decades ago in *Bianchi*, that a newspaper may not intervene in a criminal case, even for the limited purpose of asserting access to records, and therefore may not seek appellate review of a an adverse ruling.

This seems more true where, as here, the other cases (the criminal proceedings) are still pending. If this Court entertains an original action, there is no obvious procedure in which the defendants in the criminal cases can argue their positions, and no obvious opportunity for this Court to weigh their assertions against the arguments raised by the requester of the public records.<sup>5</sup> The filing of an action naming the judges as parties also puts them in an awkward position since they are still adjudicating the criminal cases (it appears this was not the case when *Ishikawa* was filed) and are in no position to "defend" their previous rulings in this Court. The criminal cases could

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<sup>5</sup> In *Ishikawa*, the King County Prosecuting Attorney appeared and argued for the Respondent judge. *Id.*, 97 Wn.2d at 32. Since the prosecutor had been the party who had moved to close the criminal proceeding at issue in that case, there was no obvious conflict between defending the action taken by the judge and advocating the position the prosecutor had taken below. By contrast, in this case, the Pierce County Prosecuting Attorney did not join the motions of the criminal defendants. Since the prosecuting attorney has two other roles in these cases—prosecuting the criminal cases and advising the custodian of the records at issue (the PCSO), that office cannot also represent the Respondent judges in this case.



potentially proceed in parallel with this case, opening the possibility of inconsistent and confusing rulings on issues that overlap.

- C. If this Court does allow an original action based on the Petition, it should clarify that the judges are named as nominal parties and should require the joinder of parties whose interests will be affected by the outcome of this proceeding.**

To the extent the Court is inclined to extend *Ishikawa* and favor the use of an original action for an extraordinary writ for the purpose of reviewing the actions taken by judges in separate proceedings, the Court should at least recognize that such a proceeding is a virtual legal fiction adopted to allow public records requesters to obtain appellate review of trial court decisions in criminal proceedings to which they were not parties. The Court could, first, clarify that in such a case, judges named as Respondents are named to invoke the Court's original jurisdiction, and the judges are not actually expected to appear and act as advocates in the original jurisdiction case.

In addition, the Court needs to correct the other obvious deficiency in such a procedure—the absence of truly adverse parties. In any trial court dispute over access to public records, there is an adverse party in the trial court arguing that public access to the records should be denied or limited (here, several defendants in criminal cases). If the same question is to be considered by this Court, the party or parties who argued against public

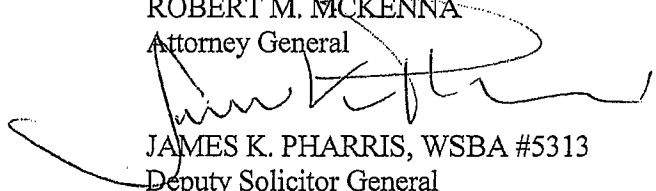
disclosure need to be a part of the proceeding, or (1) some party may be denied its chance to argue its position, possibly on an important constitutional issue, and (2) this Court may find itself without adverse parties present to adjudicate the case.<sup>6</sup>

### CONCLUSION

For the reasons stated above, the Court should dismiss the Petition or treat it as a motion for discretionary review under RAP 2.3. In the alternative, the Court should note that the judges are nominal parties and should require the joinder of parties whose rights would be affected by the outcome of this proceeding.

RESPECTFULLY SUBMITTED this 25th day of June,  
2010.

ROBERT M. MCKENNA  
Attorney General



JAMES K. PHARRIS, WSBA #5313  
Deputy Solicitor General  
PO Box 40100  
Olympia, WA 98504-0100  
360-664-3027  
jamesp@atg.wa.gov

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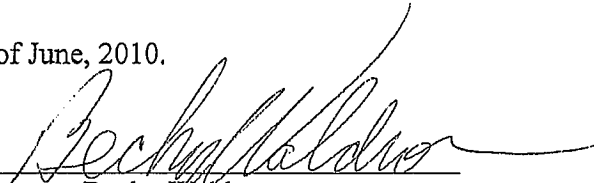
<sup>6</sup> In this case, the criminal defendants are making serious arguments that release of the records at issue will jeopardize their ability to defend themselves against criminal charges. For instance, Darcus Allen argues that disclosure would "irreparably impair Mr. Allen's ability to receive a fair trial by a fair and impartial jury." Mem. in Support of Protective Order at 3 (included in Exhibit E to the Petition and also Exhibit C to this Response). This Court is in a very difficult position to evaluate the strength of this argument if Mr. Allen is not a participant in the case.

### CERTIFICATE OF SERVICE

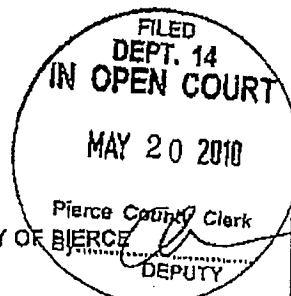
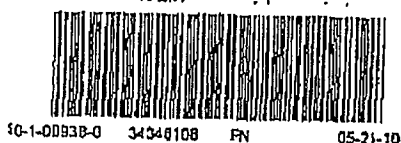
I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of Judges' Response To Petition For Writ Of Mandamus And Motion For Accelerated Review to be served on the following via e-mail:

Bruce Johnson – brucejohnson@dwt.com  
Eric Stahl – ericstahl@dwt.com  
Sarah Duran – sarahduran@dwt.com  
Mark Lindquist – mlindqu@co.pierce.wa.us  
Stephen Penner – spenner@co.pierce.wa.us  
Kevin McCann – kmccann@co.pierce.wa.us  
Craig Adams – cadams@co.pierce.wa.us  
Mary High – mhigh@co.pierce.wa.us  
Keith MacFie – dalymac@harbornet.com  
Kirk Mosley – chipmosley3@yahoo.com  
John O'Melveny – jomelveny@harbornet.com  
Kent Underwood – kent.underwood@kunderwoodlaw.com  
Grace Pierre-Whitener – whitenerh@wrwattorneys.com  
Philip Thornton – pthorntonatty@qwestoffice.net  
William Hanbey – hanbeyps@olywa.net  
Thomas Miller – tom@christielawgroup.com

DATED this 25th day of June, 2010.

  
Becky Waldron  
Legal Assistant

# **EXHIBIT A**



## IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

DAVIS, EDDIE LEE,  
 DAVIS, DOUGLAS EDWARD  
 HINTON, RICKEY  
 WILLIAMS, QUIANA M.  
 NELSON, LATRECIA  
 CLEMMONS, LATANYA K.  
 ALLEN, DARCUS,

Defendants.

No: 09-1-05374-1  
 No: 09-1-05375-0  
 No: 09-1-05340-6  
 No: 09-1-05452-7  
 No: 09-1-05453-5  
 No: 09-1-05523-0  
 No: 10-1-00938-0

FINDINGS AND ORDER RE: *IN CAMERA*  
 REVIEW OF PCSO DOCUMENTS

THIS MATTER having come on before the undersigned Judge for an *in camera* review of documents assembled by the Pierce County Sheriff's Office (PCSO); and the Court having made such review and considered the briefing of the parties and applicable statutes and case law, now, therefore, the Court makes the following findings and order:

PROCEDURAL HISTORY

Public records were requested from the PCSO by Robert J. Hill, American Economy Insurance Company, Christie Law Group, Michael Hanbey (attorney) and the Seattle Times. DPA/Legal Advisor Craig Adams memorialized the documents requested ("Summary of Public Records Requests 3/18/2010") and the responsive documents held ("Summary of Documents Held by Pierce County Sheriff's Department Subject to Disclosure 4/23/2010"). By order dated 4/7/2010, Judge Bryan Chushcoff ordered a stay of disclosure of records until 4/21/2010. On 4/23/2010, Judge Stephanie Arend extended Judge Chushcoff's order to 4/29/2010 for presentation of an order reflecting her oral ruling. On

FINDINGS AND ORDER RE: *IN CAMERA*  
 REVIEW OF PCSO DOCUMENTS

1 4/29/2010, an order continuing the stay re: *in camera* review for documents under PRA was signed and  
 2 entered by the Court, appointing the undersigned to review the documents held by the PCSO *in camera*.  
 3 The 4/29 order also extended the stay, set a briefing and objection schedule and required the review to  
 4 be completed by May 20, 2010. On May 7, 2010, Judge Arend entered an order on motion for  
 5 reconsideration and for *in camera* review for documents under PRA.

6 Following the above, the undersigned was supplied with copies of all orders, briefs filed to date,  
 7 objections and other related miscellaneous pleadings, along with an original CD with index and  
 8 documents referenced in Mr. Adams' 4/23/2010 summary. Subsequent to 5/7/2010, the Court received  
 9 additional pleadings which included:

- 10 ▪ Memorandum re: Objection to PCSO Documents Identified for Release (filed by  
 Defendant Darcus Allen, 5/14/2010)
- 11 ▪ Objections to Disclosure (filed by Letrecia Nelson, 5/14/2010)
- 12 ▪ Notice of Joinder in Objections to PCSO Documents Identified for Release (filed by  
 Defendant Douglas Davis, 5/17/2010)
- 13 ▪ Seattle Times' Opposition to Memorandum re: Objection to PCSO Documents Identified  
 for Release (filed by Seattle Times, 5/18/2010)
- 14 ▪ Seattle Times' Objection to Douglas Davis' Notice of Joinder in Objections to PCSO  
 Documents Identified for Release (filed 5/18/2010)
- 15 ▪ Seattle Times' Response to Letrecia Nelson's Objections to Disclosure (filed 5/18/2010)

16 The Court is advised that the records requested by Robert J. Hill were previously determined  
 17 exempt by the PCSO. Apparently, Mr. Hill made no further attempt to object to the non-disclosure. The  
 18 records requested by Mr. Hill were not included in the indexed records and he has not appeared at any  
 19 of the hearings on this matter.

#### 20 GENERAL TENETS OF THE PRA

21 Strong public policy is expressed by the Legislature for full and open disclosure regarding  
 22 government process. *RCW 42.56.030*. The burden falls on the objecting party to establish that an  
 23 exemption applies. *Progressive Animal Welfare Soc. v. UW*, 125 Wn.2d 243, 251, 257-258, 884 P.2d  
 24 592 (1994). The collecting agency (PCSO) summarized the records held as responsive to the requests  
 25 but, significantly, voiced no objection to disclosure. The Defendants in the above cases did object.

1 The PRA (Public Records Act) guarantees the public full access to  
 2 information concerning the workings of the government. *[cite omitted]*  
 3 The PRA preserves "the most central tenets of representative  
 4 government, namely, the sovereignty of the people and the  
 5 accountability to the people of public officials and institutions." *[cite*  
 6 *omitted]*

7 The PRA requires disclosure of all public records unless an exemption  
 8 applies. *[cite omitted]*. When a party seeks a public record, the  
 9 government agency carries the burden of proving that the record is  
 10 exempt from disclosure. *[cite omitted]*. Additionally, if redaction would  
 11 eliminate the need for an exemption, the PRA requires disclosure of the  
 12 redacted record. RCW 42.56.210(1).

13 *Koenig v. Thurston County*, \_\_\_\_ Wn. App. \_\_\_\_, \_\_\_\_ P.3d \_\_\_\_, 2010 WL 1309517, p. 7 of 24  
 14 (Wash. App. Div. 2, April 6, 2010).

15 With the foregoing public policy considerations and appellate direction in mind, the Court  
 16 reviewed documents, additional case law and concluded factually that the risk to Defendants' fair trial  
 17 rights of pretrial publicity, weighs in favor of non-disclosure for most of the documentation.

#### 18 IN CAMERA REVIEW

19 The process of *in camera* review protects the investigative process, the privacy of an individual  
 20 and the Defendant's right to a fair trial. Multiple courts confirm the need for such a review by the trial  
 21 Court. *Cowles v. Spokane*, 139 Wn.2d 472, 479, 987 P.2d 620 (1999); *Linstrom v. Ladenburg*, 136  
 22 Wn.2d 595, 612, 963 P.2d 869 (1998). All parties agreed that such a review was necessary in this case  
 23 and this review followed.

#### 24 STANDING

25 Defendants have standing to object to the release of the materials identified by the PCSO.  
 Having reviewed the documents, this Court finds that while many of the records do not specifically name  
 one or more of the Defendants, the records "pertain" to them as an overall extensive investigation  
 culminating in the charges filed against these seven Defendants.

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1 **VIOLATION OF RPC'S AND/OR BENCH-BAR-PRESS GUIDELINES**

2 The Court finds that although the Rules of Professional Conduct (RPC's) and the Bench-Bar-  
3 Press Guidelines suggest ethical obligations and considerations, they do not rise to the level of  
4 mandatory directives in this context.

5 **RIGHT TO PRIVACY**

6 The findings and decision of the Court are based on the paramount concern for the Defendants'  
7 fair trial rights (see discussion below). Although considered, the privacy rights of non-charged individuals  
8 was not the Court's primary focus.

9 **WORK PRODUCT**

10 The work product privilege does not apply in this case because the documents are now in the  
11 possession of the opposing party by virtue of the CD given to the undersigned and Defendants' counsel.  
12 Insofar as the mental impressions of investigators, police officers and/or prosecutors are revealed in the  
13 materials, the gathering agencies would have had standing to make this objection to production of the  
14 information to the opposing party and chose not to do so. Therefore, the privilege is waived.

15 **EFFECTIVE LAW ENFORCEMENT EXEMPTION**  
16 **(ONGOING INVESTIGATION)**

17 If a record is an investigative record compiled by law enforcement, its  
18 nondisclosure must be "essential" to law enforcement or to protect a  
19 person's right to privacy for that record to be exempt from disclosure  
20 under RCW 42.56.240(1). Whether nondisclosure is essential to  
21 effective law enforcement is an issue of fact. *[cite omitted]* The broad  
22 language of this exemption, which the legislature has not defined,  
23 clashes with the PRA's presumption and preference for disclosure. *[cite*  
24 *omitted]* When an agency claims this exemption, the courts may  
25 consider affidavits from those with direct knowledge of and responsibility  
for the investigation. *[cite omitted]*

21 *Koenig v. Thurston County, supra*, 2010 WL 1309617, p. 10 of 24.

22 In *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997), the Court approved the two  
23 step analysis for determination of the scope of the effective law enforcement exemption. First, the  
24 documents must have been "compiled by law enforcement." Second, the Court evaluates whether the  
25 document(s) is essential to effective law enforcement. *Newman v. King County, supra*, 133 Wn.2d at



1 573. There is no question that the documents in this case were compiled by law enforcement such that  
2 prong one is met. The second step is to determine whether the investigation is leading toward an  
3 enforcement proceeding. The *Newman* Court cites approvingly to *NLRB v. Robbins*, 437 U.S. 214, 223-  
4 224 (1978) for the proposition that the Court may feasibly make a "generic determination" about what is  
5 essential for effective law enforcement." *Id.* The *Newman* Court then adopts the Federal Court's three  
6 part inquiry from the objecting agency. Consideration should be given to:

- 7 (1) Affidavits by people with direct knowledge of and responsibility for  
8 the investigation . . . (2) whether resources are allocated to the  
9 investigation; and (3) whether enforcement proceeding are [sic]  
10 contemplated.

11 *Id.*

12 The differences between the *Newman* case and the instant matter are clear. *Newman* was a  
13 cold, 25 year old case which had not yet been charged. The *Davis, et al.* cases are pending charges and  
14 in fact one (Latonya Clemmons) is currently in trial. Although Defendants argue that the investigation is  
15 ongoing, it would appear, absent further factual input from the charging agency, that the charging  
16 decisions have been made and the investigation has concluded, that is, with one exception. The decision  
17 whether to convert the case of Darcus Allen to a capital prosecution has not been made. Counsel for Mr.  
18 Allen represents that this decision must be made on or before July 15, 2010. Therefore, as to that  
19 charge, the investigation is ongoing.

20 The *Newman* analysis presumes the reviewing Court's need for the thoughts, impressions and  
21 opinions of those involved in the ongoing investigation in order to make conclusions as to whether the  
22 exemption of "effective law enforcement" applies. Since the compiling agency is not the objecting party  
23 and has not (to this Court's knowledge) supplied any affidavits, opinions, reports or impressions regarding  
24 the ongoing nature of this investigation, the record does not allow for a "generic determination" as  
25 contemplated by the *Newman* Court. Rather, the Court must rely on the documents submitted, the  
briefing of the parties and the law and the facts of the case(s). Because the Court relies on the  
exemption in RCW 42.56.540 and the reasoning below, the Court does not request further factual  
explanation from the compiling agency.

This Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial, [cites omitted]. To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity, [cites omitted]. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary.

The above Court determined the open, public trial rights of the press in the context of a motion to suppress and whether the hearing should be closed to the public. *Gannett Co. Inc. v. DePasquale*, *supra*. Holding that the Defendant's right to a fair, impartial jury outweighed the media's right to be present, the Court stated;

*Gannett Co. Inc. v. DePasquale, supra.*

The facts of the *Gannett* case are analogous to the instant matter because Defendants urge this Court to restrict access to the PCSO documents based in part on each Defendant's right to a fair, impartial jury uninfluenced by pretrial exposure to potential evidence. One of the requesting parties, the *Seattle Times*, argues that the objecting parties failed to submit evidence to support factually their position. The *Seattle Times* is correct; Defendants do not provide data, statistics, print or video stories to substantiate their position that pretrial publicity will jeopardize Defendants' right to a fair and impartial jury.

1 The Court takes judicial notice of the extraordinary level of local, state and national attention that  
 2 this story garnered for days and weeks following the November 29, 2009 event. By recognizing the  
 3 extensive coverage of these cases by the media, the Court does not suggest that a fair and impartial jury  
 4 and proceeding cannot occur in Pierce County; however, further release of investigative materials and  
 5 details may jeopardize that right which in turn justifies exemption under the PRA.

#### 6 DOCUMENTS REVIEWED

7 The Court reviewed the following documents which were provided by CD and indexed as follows  
 8 (the number in parentheses represents the number of subsections under each heading):

#### 9 "Files Currently on the Disc (12)"

- 10 • ATF Reports (2)
- 11 • Interviews and Statements (27)
- 12 • King County Housing Authority
- 13 • King County Sheriff (47)
- 14 • PCSD Case Reports (154)
- 15 • Related PCSD Case Reports (9)
- 16 • Seattle Police Department (12)
- 17 • Tacoma Police Department (8)
- 18 • Washington State Fusion Center
- 19 • Case Summary -- Time Line
- 20 • Major Incident Log
- 21 • Photo Lineups

22 Based on the above legal analysis and the Court's review of the documents produced, the Court  
 23 hereby finds that the documents are producible or exempt for the reasons noted below.

- 24 1. ATF Reports  
 25 *Exempt - Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*
2. Witness/Suspect Statements (including Tacoma Police Department Officer Notes)  
*Exempt - Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*
3. King County Housing Authority & Financial/Protected Housing Documents  
*Exempt - Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*
4. King County Sheriff  
*Event log - Exempt - Endangers the fair trial rights of the Defendant(s).  
 RCW 42.56.540*

1 Vehicle Impound – *Exempt – Endangers the fair trial rights of the Defendant(s).*  
RCW 42.56.540

2 Officer Reports – *Exempt – Endangers the fair trial rights of the Defendant(s).*  
3 RCW 42.56.540

4 5. Related Pierce County Sheriff Department

5 *All records related to Martin Santo Lewis should be released within five (5) days of*  
6 *5/28/2010, unless further objection is received.*

7 09-333-743-1 pdf

8 *Exempt – Endangers the fair trial rights of the Defendant(s).*  
9 RCW 42.56.540

10 09-131-011-2 pdf

11 *Exempt – Endangers the fair trial rights of the Defendant(s).*  
12 RCW 42.56.540

13 09-131-0111-3 pdf

14 *Exempt – Endangers the fair trial rights of the Defendant(s).*  
15 RCW 42.56.540

16 09-131-0111-4 pdf

17 *Exempt – Endangers the fair trial rights of the Defendant(s).*  
18 RCW 42.56.540

19 09-131-0111-5 pdf

20 *Exempt – Endangers the fair trial rights of the Defendant(s).*  
21 RCW 42.56.540

22 09-333-0743-1 pdf

23 *Not exempt - shall be produced by PCSO within five (5) days of 5/28/10, unless further*  
24 *objection is received.*

25 09-333-0743-2 pdf

*Not exempt - shall be produced by PCSO within five (5) days of 5/28/10, unless further*  
*objection is received.*

09-334-0023 FIR.pdf

*Exempt – Endangers the fair trial rights of the Defendant(s).*  
RCW 42.56.540

1 09-355-0721 FIR.pdf

2 *Exempt – Endangers the fair trial rights of the Defendant(s).*  
 3 *RCW 42.56.540*

4 6. Washington State Fusion Center Intelligence Reports

5 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

6 7. Seattle Police Department Reports

7 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

8 8. Major Incident Log

9 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

10 9. Tacoma Police Department Files

11 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

12 10. Tacoma Police Department Forensics Reports

13 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

14 11. Pierce County Sheriff Department Incident Reports

15 Att Summary Sheet 2-9-10.pdf

16 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

17 Attachment Summary.pdf

18 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

19 Incident No. 093330363.1

20 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

21 Incident No. 093330363.2

22 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

23 Incident No. 093330363.3

24 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

25 Incident No. 093330363.4

*Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

1 Incident No. 093330363.5

2 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

3 Incident No. 093330363.6

4 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

5 Incident No. 093330363.7

6 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

7 Incident No. 093330363.8

8 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

9 Incident No. 093330363.9

10 *Not exempt - shall be produced by PCSO within five (5) days of 5/28/10, unless further  
objection is received.*

11 Incident No. 093330363.10

12 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

13 Incident No. 093330363.11

14 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

15 Incident No. 093330363.12

16 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

17 Incident No. 093330363.13

18 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

19 Incident No. 093330363.14

20 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

21 Incident No. 093330363.15

22 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

23 Incident No. 093330363.16

24 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

25 Incident No. 093330363.17

*Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

1 Incident No. 093330363.18

2 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

3 Incident No. 093330363.19

4 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

5 Incident No. 093330363.20

6 *Not exempt - shall be produced by PCSO within five (5) days of 5/28/10, unless further objection is received.*

7 Incident No. 093330363.21

8 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

9 Incident No. 093330363.22

10 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

11 Incident No. 093330363.23

12 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

13 Incident No. 093330363.24

14 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

15 Incident No. 093330363.25

16 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

17 Incident No. 093330363.26

18 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

19 Incident No. 093330363.27

20 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

21 Incident No. 093330363.28

22 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

23 Incident No. 093330363.29

24 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

25 Incident No. 093330363.30

*Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

1 Incident No. 093330363.31  
2 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
3 Incident No. 093330363.32  
4 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
5 Incident No. 093330363.33  
6 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
7 Incident No. 093330363.34  
8 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
9 Incident No. 093330363.35  
10 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
11 Incident No. 093330363.36  
12 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
13 Incident No. 093330363.37  
14 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
15 Incident No. 093330363.38  
16 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
17 Incident No. 093330363.39  
18 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
19 Incident No. 093330363.41  
20 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
21 Incident No. 093330363.42  
22 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
23 Incident No. 093330363.43  
24 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
25



1 Incident No. 093330363.44

2 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

3 Incident No. 093330363.45

4 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

5 Incident No. 093330363.46

6 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

7 Incident No. 093330363.47

8 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

9 Incident No. 093330363.48

10 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

11 Incident No. 093330363.49

12 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

13 Incident No. 093330363.50

14 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

15 Incident No. 093330363.51

16 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

17 Incident No. 093330363.52

18 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

19 Incident No. 093330363.53

20 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

21 Incident No. 093330363.54

22 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

23 Incident No. 093330363.55

24 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

25 Incident No. 093330363.56

*Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

Incident No. 093330363.57

1           Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540

2           Incident No. 093330363.58

3           Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540

4           Incident No. 093330363.59

5           Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540

6           Incident No. 093330363.60

7           Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540

8           Incident No. 093330363.61

9           Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540

10          Incident No. 093330363.62

11          Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540

12          Incident No. 093330363.63

13          Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540

14          Incident No. 093330363.64

15          Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540

16          Incident No. 093330363.65

17          Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540

18          Incident No. 093330363.66

19          Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540

20          Incident No. 093330363.67

21          Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540

22          Incident No. 093330363.68

23          Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540

24          Incident No. 093330363.69

25          Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540

          Incident No. 093330363.70

          Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540

1 Incident No. 093330363.71

2 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

3 Incident No. 093330363.72

4 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

5 Incident No. 093330363.73

6 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

7 Incident No. 093330363.74

8 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

9 Incident No. 093330363.75

10 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

11 Incident No. 093330363.76

12 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

13 Incident No. 093330363.77

14 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

15 Incident No. 093330363.80

16 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

17 Incident No. 093330363.81

18 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

19 Incident No. 093330363.82

20 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

21 Incident No. 093330363.83

22 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

23 Incident No. 093330363.84

24 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

25 Incident No. 093330363.85

*Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

- 1 Incident No. 093330363.86
- 2 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540
- 3 Incident No. 093330363.87
- 4 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540
- 5 Incident No. 093330363.88
- 6 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540
- 7 Incident No. 093330363.89
- 8 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540
- 9 Incident No. 093330363.90
- 10 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540
- 11 Incident No. 093330363.91
- 12 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540
- 13 Incident No. 093330363.92
- 14 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540
- 15 Incident No. 093330363.93
- 16 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540
- 17 Incident No. 093330363.94
- 18 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540
- 19 Incident No. 093330363.95
- 20 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540
- 21 Incident No. 093330363.96
- 22 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540
- 23 Incident No. 093330363.97
- 24 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540
- 25 Incident No. 093330363.98

1 Incident No. 093330363.99

2 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

3 Incident No. 093330363.100

4 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

5 Incident No. 093330363.101

6 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

7 Incident No. 093330363.102

8 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

9 Incident No. 093330363.103

10 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

11 Incident No. 093330363.104

12 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

13 Incident No. 093330363.105

14 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

15 Incident No. 093330363.106

16 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

17 Incident No. 093330363.107

18 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

19 Incident No. 093330363.108

20 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

21 Incident No. 093330363.109

22 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

23 Incident No. 093330363.110

24 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

25 Incident No. 093330363.111

*Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

1 Incident No. 093330363.112

2 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

3 Incident No. 093330363.113

4 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

5 Incident No. 093330363.114

6 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

7 Incident No. 093330363.115

8 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

9 Incident No. 093330363.116

10 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

11 Incident No. 093330363.117

12 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

13 Incident No. 093330363.118

14 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

15 Incident No. 093330363.119

16 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

17 Incident No. 093330363.120

18 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

19 Incident No. 093330363.121

20 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

21 Incident No. 093330363.122

22 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

23 Incident No. 093330363.123

24 *Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

25 Incident No. 093330363.124

*Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

1 Incident No. 093330363.125  
2 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
3 Incident No. 093330363.126  
4 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
5 Incident No. 093330363.127  
6 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
7 Incident No. 093330363.128  
8 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
9 Incident No. 093330363.129  
10 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
11 Incident No. 093330363.130  
12 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
13 Incident No. 093330363.131  
14 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
15 Incident No. 093330363.132  
16 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
17 Incident No. 093330363.133  
18 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
19 Incident No. 093330363.134  
20 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
21 Incident No. 093330363.135  
22 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
23 Incident No. 093330363.136  
24 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
25 Incident No. 093330363.137  
Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540

1 Incident No. 093330363.138  
2 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
3 Incident No. 093330363.139  
4 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
5 Incident No. 093330363.140  
6 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
7 Incident No. 093330363.141  
8 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
9 Incident No. 093330363.142  
10 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
11 Incident No. 093330363.143  
12 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
13 Incident No. 093330363.144  
14 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
15 Incident No. 093330363.145  
16 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
17 Incident No. 093330363.146  
18 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
19 Incident No. 093330363.147  
20 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
21 Incident No. 093330363.148  
22 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
23 Incident No. 093330363.149  
24 Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540  
25 Incident No. 093330363.150  
Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540



Incident No. 093330363.151

*Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

Incident No. 093330363.155

*Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

Prop rep 09-333-0363-31.pdf

*Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

Property Report.pdf

*Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

12. Case Summary

*Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

13. Major Incident Log

*Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

14. Photo Lineup

*Exempt – Endangers the fair trial rights of the Defendant(s). RCW 42.56.540*

#### ORDER

Based on the foregoing analysis, review and findings, the Court hereby orders as follows:

1. The Court incorporates the subsection entitled "Documents Reviewed" above as though fully set forth herein and orders that the indexed documents are exempt from disclosure for the reasons noted with the exception(s) of:

*Certain documents under the section "Related Pierce County Sheriff Department Cases" and specifically those which relate to Martin Santo Lewis (09-333-0743-1.pdf and 09-333-0743-2.pdf).*

*Pierce County Sheriff Department Incident reports: 093330363.9 and 093330363.20*

*The above documents shall be produced by PCSO within five (5) days of 5/28/2010, unless further objection is received.*

2. The parties shall have 6 court days from the date of this order to file written specific objection to this Court's decision and request an opportunity for oral argument. If no objection and/or request is made prior to the close of business (4:30 p.m.) on Friday, May 28, 2010, this order shall be

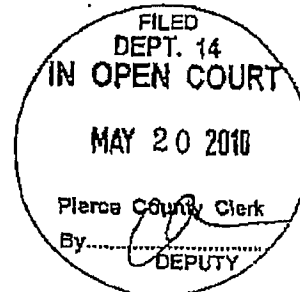
1 final and the non-exempt documents referenced under (1) above shall be released to the requesting  
2 parties within five (5) days;

3 3. The Court's order signed by Judge Arend on May 7, 2010, staying disclosure by the  
4 PCSO is hereby extended to May 28, 2010, to allow for further objection and/or request for argument; and

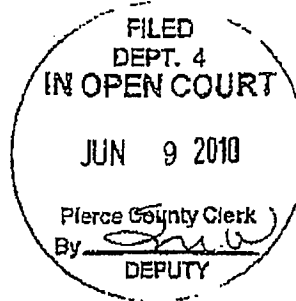
5 4. This order shall be subject to revision as soon as the last of the above captioned cases is  
6 concluded.

7 DATED this 20th day of May, 2010.

8   
9 JUDGE SUSAN K. SERKO



# **EXHIBIT B**



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

EDDIE LEE DAVIS,

DOUGLAS EDWARD DAVIS,

RICKEY HINTON,

QUIANA M. WILLIAMS,

LATRECIA NELSON,

DARCUS ALLEN,

Defendants.

NO. 09-1-05374-1

NO. 09-1-05375-0

NO. 09-1-05340-6

NO. 09-1-05452-7

NO. 09-1-05453-5

NO. 10-1-00938-0

ORDER SEALING EXHIBITS  
ADMITTED IN STATE V.  
CLEMMONS, PIERCE COUNTY  
CAUSE NO. 09-1-05523-0

THIS MATTER having come on for hearing before the Honorable Judge Arend, on an Ex Parte Motion brought by John O'Melveny, attorney for Defendant Eddie Davis, and the court having reviewed the Order to Seal and the Findings And Order Re: In Camera Review of PCSO Documents signed and entered by Judge Seiko on May 20, 2010, and the court being fully advised, now, therefore, it is hereby:

ORDER SEALING EXHIBITS - 1

D:\FILES\Courtroom Files\DAVIS EDDIE LEE (DAC-Retarding Crim Asslt)\JPI EADINGS\Order Sealing Exhibits.wpd

JOHN P O MELVENY  
Attorney at Law  
11 No Broadway, Suite A  
Tacoma WA 98403-3120  
253 497 4979

ORIGINAL

*and a hearing for all interested parties to present arguments. A hearing on this matter will be held on June 25, 2010, or soon as the court may order.*  
ORDERED that all exhibits admitted in the case of State v. Clemmons, Pierce County Cause No. 09-1-05523-0 shall be sealed pending examination of these exhibits by defense counsel. If defense counsel objects to the release of any of these exhibits, a hearing with notice to all parties shall be scheduled.

DATED this 9<sup>th</sup> day of June, 2010.

*Stephanie Arend*  
Judge Stephanie Arend PJ

Presented by:

*John O'Melveny*  
JOHN O'MELVENY, WSBA #9569  
Attorney for Defendant, Eddie Davis

FILED  
DEPT. 4  
IN OPEN COURT

JUN 9 2010

Pierce County Clerk  
By *[Signature]*  
DEPUTY

ORDER SEALING EXHIBITS - 2

D:\FILES\Courtroom Files\DAVIS EDDIE LEG (DAC- Rendering Crim Justice)\PLEADINGS\Order Sealing Exhibits.wpd

JOHN P. O'MELVENY  
Attorney at Law  
15 No. Broadway, Suite A  
Tacoma, WA 98401-1120  
253 597 8979

# **EXHIBIT C**

FILED  
IN COUNTY CLERK'S OFFICE

A.M. MAR 12 2010 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOKER, COUNTY CLERK  
ST.                      COUNTY CLERK

10-1-00938-0 33932250 MMS 03-15-10

## SUPERIOR COURT OF THE STATE OF WASHINGTON

## FOR PIERCE COUNTY

STATE OF WASHINGTON,  
Plaintiff,

v.

DARCUS ALLEN,  
Defendant.

NO. 10-1-00938-0

MEMORANDUM IN SUPPORT OF  
PROTECTION ORDER

## INTRODUCTION

Mr. Allen, joins in the Motion brought by Defendant Ricky Hinton, P.C. Superior Court Cause No. 09-1-05430-6 and Defendant Eddie Lee Davis, Pierce County Superior Court Cause No. 09-1-05374 and adopts and incorporates the arguments made by the Hinton and Davis in support of Defendant's Motion for a Protective Order and the arguments made in this Memorandum. The materials should not be released for the reasons stated in the briefs, however, if the Court is inclined to entertain a request for disclosure of all the investigative materials generated by law enforcement in the course of the Clemmons investigation, this

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DEPARTMENT OF ASSIGNED COUNSEL  
949 MARKET STREET, SUITE 334  
TACOMA, WASHINGTON 98402  
(253) 798-6062 Facsimile 253-798-6715

ORIGINAL

1 Court must conduct an in camera review of the materials to determine whether the materials,  
 2 or any portion of the materials, are exempt from disclosure under the Public Records Act.

### 4 AUTHORITY

#### 5 1. Procedure.

6 RCW 42.56.540 establishes the court procedures for the protection of public  
 7 records as follows:

8 The examination of any specific public record may be  
 9 enjoined if, upon motion and affidavit by an agency or  
 10 its representative or a person who is named in the  
 11 record or to whom the record specifically pertains, the  
 12 superior court for the county in which the movant  
 13 resides or in which the record is maintained, finds that  
 14 such examination would clearly not be in the public  
 15 interest and would substantially and irreparably damage  
 16 any person, or would substantially and irreparably  
 17 damage vital government functions. An agency has the  
 option of notifying persons named in the record or to  
 whom the record specifically pertains that release of a  
 record has been requested. However, this option does  
 not exist where the agency is required by law to provide  
 such notice.

18 The mechanics of the court's review are further addressed in Cowles Publ'g Co. v.  
 19 Spokane Police Department, 139 Wn. 2d 472, 478, 987 P.2d 620 (1999). Cowles holds that  
 20 the court is "qualified to evaluate the potential affect of disclosure on the trial process . . .  
 21 Accordingly, to the extent nondisclosure may be necessary in a case such as this, an in  
 22 camera review by the court is the proper method to determine whether nondisclosure of a  
 23 document, or portions of a document, is essential to effective law enforcement." See also  
 24 Limstrom, 136 Wn.2d at 615 (in camera review is the only way a court can determine what  
 25 portion of a document, if any, is exempt from disclosure.) In sum, if this Court is uncertain as  
 26 to whether disclosure will violate the Defendant's constitutionally protected rights to a fair

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1 trial by a fair and impartial jury, Cowles requires the trial court to conduct an in camera  
2 review and make a case by case determination of whether nondisclosure is mandated. 139  
3 Wn.2d at 479-80; See also, State v. Jones, 96 Wn. App.369, 377, 979 P.2d 898 (1999)(in  
4 camera review of confidential materials per a claim of RCW 5.60.060(5)).  
5

6 2. Disclosure will irreparably impair Mr. Allen's ability to receive a fair  
7 trial by a fair and impartial jury

8 As has been observed many times, death, as a punishment is different. When a  
9 defendant's life is at stake, the courts have been particularly sensitive to insure that every  
10 safeguard is observed. Gregg v. Georgia, 428 U.S. 153, 187, 49 L. Ed. 2d 859, 96 S. Ct. 2909  
11 (1976). State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981). Criminal statutes involving  
12 the death penalty must be construed in a manner which is particularly sensitive to the  
13 protections afforded the defendant.  
14

15 This is the potential capital prosecution of Darcus Allen and these proceedings could  
16 result in his death by lethal injection or hanging. The State, through the Prosecuting Attorney,  
17 has announced filed a Notice of Special proceeding indicating it may seek to kill Darcus  
18 Allen for his alleged association with Maurice Clemmons. "The fundamental respect for  
19 humanity underlying the Eighth Amendment's prohibition against cruel and unusual  
20 punishment gives rise to a special need for reliability in the determination that death is the  
21 appropriate punishment in any capital case." Johnson v. Mississippi, 486 U.S. 578, 584, 108  
22 S.Ct. 1981, 100 L.Ed.2d 575 (1988) (quoting Gardner v. Florida, 430 U.S. 349, 363-64, 97  
23 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (White, J., concurring) (quoting Woodson v. North  
24 Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). It is now well established  
25  
26

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(253) 798-6062 Facsimile 253-798-6715

1 that when a defendant's life is at stake, a court must be "particularly sensitive to insure that  
 2 every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187, 96 S.Ct. 2909, 49  
 3 L.Ed.2d 859 (1976). As this Court is acutely aware, the penalty of death is qualitatively and  
 4 profoundly different from any other sentence. e.g. Ford v. Wainwright, 477 U.S. 399, 411,  
 5 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) ("In capital proceedings generally, this Court has  
 6 demanded that fact finding procedures aspire to a heightened standard of reliability. This  
 7 especial concern is a natural consequence of the knowledge that execution is the most  
 8 irremediable and unfathomable of penalties; that death is different." (citations omitted));  
 9 California v. Ramos, 463 U.S. 992, 998-99, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)  
 10 (recognizing "the qualitative difference of death from all other punishments"); Eddings v.  
 11 Oklahoma, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) ("the imposition of death  
 12 by public authority is. . . profoundly different from all other penalties"). For this reason, our  
 13 system of justice must go "to extraordinary measures to ensure that the prisoner sentenced to  
 14 be executed is afforded process that will guarantee, as much as is humanly possible, that the  
 15 sentence was not imposed out of whim, passion, prejudice, or mistake." Eddings v.  
 16 Oklahoma, 455 U.S. at 118 (O'Connor, J. concurring) (emphasis added). These  
 17 "extraordinary measures" must be taken at both stages of any capital trial. Beck v. Alabama,  
 18 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

19 In this particular case the wholesale release of police investigative records would  
 20 impair the trial process, violate the constitutional rights of the defendant, and hinder an  
 21 ongoing investigation by law enforcement. Although the Supreme Court held in Cowles  
 22 Publishing Company v. Spokane Police Department, 139 Wn.2d 472, 987 P.2d 620 (1999) that

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26 DEPARTMENT OF ASSIGNED COUNSEL  
 949 MARKET STREET, SUITE 334  
 TACOMA, WASHINGTON 98402  
 (253) 798-6062 Facsimile: 253-798-6715

once an arrest has been made police investigative records are presumptively available to the public, it also clearly stated that presumption can be overcome in a specific case:

Although we agree with the Department that nondisclosure may, under specific circumstances, still be necessary to protect pending enforcement proceedings in an individual case, courts are as qualified to review the potential affect of disclosure on the trial process as are the police or prosecutor. The protection of enforcement proceedings is not a circumstance where the police, exercising their professional judgment, are in a better position to make disclosure decisions. Accordingly, to the extent nondisclosure may be necessary in a case such as this, an in camera review by the court is the proper method to determine whether nondisclosure of a document, or portions of a document, is essential to effective law enforcement. See Limstrom, 136 Wash .2d at 61 5,963 P.2d 869 (in camera review is the only way a court can determine what portion of a document, if any, is exempt from disclosure).

Nor does a defendant's constitutional right to a fair trial compel categorical nondisclosure of police investigative records. Facts regarding pending criminal prosecutions are often made public prior to trial. This rarely results in the inability to impanel a fair and impartial jury. Similarly, the fact that allegations have not yet been proven is not persuasive of the need to provide blanket protection for purposes of a defendant's privacy. When a criminal suspect is arrested and charged with a crime there must be some factual basis for this, whether or not all or any of the allegations can be proven beyond a reasonable doubt at trial. The general public is well aware that a person is innocent until proven guilty. Rarely would criminal allegations so devastate the reputation of the suspect that nondisclosure would be necessary to protect against the effect of false accusation. Again, to the extent protection of the trial process or the privacy rights of a suspect re essential in any given case, the trial court should make that factual determination on a case-by-case basis. In any event, under the facts of this case, we are unpersuaded by the Department's argument. At the time the Department denied the disclosure requests at issue, it had already made all the pertinent details public. Thus, there was no further information left to protect.

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949 MARKET STREET, SUITE 334  
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1  
2 In sum, we hold in cases where the suspect has been  
3 arrested and the matter referred to the prosecutor, any potential  
4 danger to effective law enforcement is not such as to warrant  
5 categorical nondisclosure of all records in the police  
6 investigative file. In such cases, to the extent nondisclosure of  
7 records or parts of records is nevertheless necessary, the trial  
8 court should conduct an in camera review and make a case-by-  
9 case determination of whether nondisclosure is essential to  
10 effective law enforcement.

11 139 Wn.2d at 478-80 (emphasis added).

12 Unlike the Supreme Court's 1999 Cowles decision, this is not a simple DUI case. The  
13 charges here are aggravated murder, and the case has already generated intense publicity. To  
14 hand the police investigative file to media and undisclosed requestors would invite even more  
15 press coverage and raise significant fair trial concerns. Moreover, unlike in Cowles the Pierce  
16 County Sheriff's Department has not already made all the pertinent details public, according  
17 the Supreme Court:

18 In any event, under the facts of this case, we are unpersuaded  
19 by the Department's argument. At the time the Department  
20 denied the disclosure requests at issue, it had already made all  
21 the pertinent details public. Thus, there was no further  
22 information left to protect.

23 139 Wn.2d at 479. The result in Cowles may well have been different had the Department not  
24 already released all the pertinent information. Here, the Pierce County Sheriff's Office has  
25 not released its investigative materials. Both for this reason, and because this is a highly  
26 complex capital case, the result reached in Cowles is not a proper one for this case.

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949 MARKET STREET, SUITE 334  
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Also the issue of pretrial release of law enforcement investigative materials is expressly restricted by the Rules of Professional Conduct. The Defense Counsel, Sheriff's Office, and presumably, the Pierce County Prosecuting Attorney's Office, take these rules very seriously. The these rules do to defense counsel, prosecutors and law enforcement, and expressly regulate pretrial disclosures. Further, the Public Records Act itself recognizes exemptions not only under RCW 42.56*et seq* but also under any "other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070. The Rules of Professional Conduct are promulgated with the approval of the Supreme Court pursuant to the State Bar Act, RCW 2.48.060. The following rules, then, do have the force of statutory law and do create an exemption to the Public Records Act:

#### **RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR**

The prosecutor in a criminal case shall:

(e) Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6. (Emphasis added.)

Rule 3.6 and the Guidelines thereunder in turn provide as follows:

#### **RULE 3.6 TRIAL PUBLICITY**

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

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949 MARKET STREET, SUITE 334  
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1  
2 **Guidelines for Applying RPC 3.6**

3 **I. Criminal.**

4 A. The kind of statement referred to in rule 3.6 which  
5 may potentially prejudice criminal proceedings is a statement  
6 which relates to:

7 (1) The character, credibility, reputation or criminal  
8 record of a suspect or defendant;

9 (2) The possibility of a plea of guilty to the offense or  
10 the existence or contents of a confession, admission or  
11 statement given by a suspect or defendant or that person's  
12 refusal or failure to make a statement;

13 (3) The performance or results of any investigative  
14 examination or test such as a polygraph examination or a  
15 laboratory test or the failure of a person to submit to an  
16 examination or test;

17 (4) Any opinion as to the guilt or innocence of any  
18 suspect or defendant;

19 (5) The credibility or anticipated testimony of a  
20 prospective witness; and

21 (6) Information the lawyer knows or reasonably should  
22 know is likely to be inadmissible as evidence in a trial.  
23 (Emphasis added.)

24 \*\*\*

25 The Supreme Court did not address these rules and guidelines in Cowles, but at a  
26 minimum they would seem to be an appropriate consideration when determining whether the  
"protection of the trial process or the privacy rights of a suspect are essential in any given  
case," as required by Cowles, supra, 139 Wn.2d at 479. If it is unethical for prosecutor or  
police to make an extrajudicial statement, how can materials containing the same information  
be public?

In counsel's declaration supporting a restraining order in this case, counsel for Mr.  
Allen states that release of the requested material would "irreparably impair the defendant's  
right to a fair trial by a fair and impartial jury." The Court can certainly take judicial notice of

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1 the extraordinary amount of press coverage which has attended the plea proceedings in  
 2 Spokane County and the instant prosecution in Pierce County. Given the stakes involved and  
 3 the resources brought to bear, the defense, the State, the Court and, the public are all vitally  
 4 interested in having this aggravated murder case lawfully and properly brought to trial. The  
 5 paramount right of the defendant in a capital case to due process and a fair trial under the  
 6 Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 3  
 7 and 22 of the Washington Constitution requires that such investigative materials not be  
 8 released while the prosecution is pending. This is not a case about access to hearings and  
 9 trial by the press and the public. The hearings have been open and the trial will be open.

12 3. The Records Are Exempt Under Newman

13  
 14 As noted that, unlike Cowles Publishing Company v. Spokane Police Department,  
 15 supra., this is not a DUI case. The parameters of such a case are commonly known and well  
 16 defined; the investigation involved in Cowles was complete when the matter was referred to  
 17 the prosecutor. Here, the investigation involves a nationally reported multiple law  
 18 enforcement homicide and is ongoing. This is a huge distinction. This case is less like  
 19 Cowles and more like Newman v. King County, 133 Wash.2d 565, 575, 947 P.2d 712 (1997),  
 20 which held that " RCW 42.17.310(1)(d)<sup>1</sup> provides a broad categorical exemption from  
 21 disclosure all information contained in an open active police investigation file." (Emphasis  
 22  
 23  
 24

25  
 26 <sup>1</sup> Recodified at RCW 42.56.210.

1 added.) The pendency of an open police investigation was determinative in Newman, where  
2 the Court stated its holding as follows:

3 The County has shown they and the FBI have personnel  
4 assigned to the case. Evidence was presented by individuals  
5 responsible for the investigation who stated the case was still  
6 open and enforcement proceedings were contemplated. The  
7 evidence also establishes the documents requested cannot be  
8 disclosed because their release would impair the ability of law  
9 enforcement to share information and would inhibit the ability  
10 of police officers to determine, in their professional judgment,  
11 how and when information will be released. We hold the broad  
12 language of the statutory exemption requires the nondisclosure  
13 of information compiled by law enforcement and contained in  
14 an open and active police investigation file because it is  
15 essential for effective law enforcement. The language of the  
16 statute provides for a categorical exemption for all records and  
17 information in these files.

18 Newman v. King County, 133 Wash.2d at 574 (emphasis added). The same should control  
19 here, or, at a minimum, the fact that an investigation continues in the present case is a factor  
20 that should be considered by the Court in determining whether the Cowles presumption is  
21 overcome here.

#### 22 4. The Records Are Exempt As The State's Work Product

23 Under Cowles, Newman, and RPC 3.6 and 3.8, then, the Court should hold that in  
24 this particular case, all the requested material is exempt from public disclosure, at least  
25 during the pendency of the criminal prosecution. In the alternative, if not categorically  
26 exempt, major portions of these materials are exempt under specific provisions of the Public  
Records Act. For example, the evaluative and organizational work product of the prosecution  
team is not available to the defense and is obviously not available to the press for publication.

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949 MARKET STREET, SUITE 334  
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Moreover, for public record purposes the underlying factual material gathered by State's litigation team is also exempt work product under RCW42.56.210. "With respect to the factual documents gathered by the prosecutor and which Mr. Limstrom had already received from other sources prior to the trial court's ruling, withhold the documents are part of the prosecutor's fact-gathering process and are work product." Limstrom v. Ladenburg, 136 Wn.2d 595,614,963 P.2d 869 (1998).

This court should not rely upon dicta from Cowles, "Generally, nothing in a police investigative file would be considered attorney work product." 139 Wn. 2d at 478. Against this "general" observation in a DUI case, however, we have here a complex aggravated murder case.

In a case of this complexity, involving multiple crime scenes in multiple counties, it should surprise no one that since this case was referred to the Pierce county Prosecuting Attorney, there have been ongoing evaluative and organizational efforts undertaken by and under the supervision of that office.

##### 5 Any Tip Records Are Exempt Under The Specific Investigative Records Exemption

Moreover any "tip" records "contains unproved claims, often made anonymously, and accordingly involves substantial privacy rights of numerous individuals." and RCW 42.56.240 exempts from disclosure:

Specific intelligence information and specific investigative records compiled by investigative, law enforcement and penology agencies, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.

1 "Right to privacy" is in turn defined at RCW 442.56.050. The Court of Appeals has  
 2 held that "specific investigative records" exemption applies to anonymous, unsubstantiated  
 3 allegations made to law enforcement because of overriding privacy concerns of the subject' of  
 4 the allegations. "[When disclosure of public investigatory records is resisted due to privacy,  
 5 the involved agency and the courts have a duty to interpret and apply RCW 42.17.31091)(d),  
 6 and pursuant to that duty, they must consider all relevant factors bearing on whether the  
 7 information in the records is of legitimate public concern." City of Tacoma v. Tacoma News.  
 8 Inc., 65 Wn.App. 140, 15 1, 827 P.2d 1094, rev. denied 1 19 Wn.2d 1020, 838 P.2d 692  
 9 (1992).  
 10  
 11

12 6. Improper Pretrial Publicity Jeopardizes A Fair trial By An Impartial Jury

13 Pretrial publicity jeopardizes a defendant's right to trial by a fair and impartial jury. A  
 14 significant amount of the coverage in the case has been inflammatory and geared towards  
 15 arousing sympathy, prejudice and passion. Statements of various individuals has not been  
 16 limited to Maurice Clemmons and his actions but has included his family members and  
 17 friends and has speculated as to the reasons behind the homicides and whether Mr. Allen was  
 18 involved as an accomplice to these murders.. It has also extensively covered the anguish and  
 19 heartbreak of the victims' families, the memorial service was held at the Tacoma Dome and  
 20 covered by four television stations and the video of the proceedings is for sale to the public.  
 21

22 This is not proper pretrial publicity. It is for the jury to decide the facts based on all  
 23 evidence admitted at trial, not on prejudice, sympathy or inadmissible evidence. It is not for  
 24 the State or potential jurors prior to trial to make these decisions without all the evidence. If  
 25 the news media entity is permitted to obtain and presumably publish the information  
 26

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 949 MARKET STREET, SUITE 334  
 TACOMA, WASHINGTON 98402  
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1 contained in the investigative files, Mr. Allen will be further deprived of his right to a fair  
2 trial. Significantly, the request for information precedes the dissemination to Mr. Allen of a  
3 single police report associated with his case.  
4

5 The United States Supreme Court has recognized that to safeguard the due process  
6 rights of an accused, a trial judge has an affirmative constitutional duty to minimize the  
7 effects of prejudicial pretrial publicity, and he may take protective measures even when they  
8 are not strictly and inescapably necessary. Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 99  
9 S. Ct. 2898, 61 L.ed.2d 608 (1979). The DePasquale Court directs a trial court to be "over  
10 cautious" in ensuring that the defendant receive a fair trial. 99 S.Ct at 2905, n. 6. Like the  
11 situation presented in DePasquale, in which the court found that publicity surrounding  
12 pretrial suppression hearings pose special risks of unfairness because it may influence public  
13 opinion against a defendant and inform potential jurors of inculpatory information that would  
14 not be admissible at trial. Moreover, the DePasquale court found that the Sixth  
15 Amendment's guarantee of a public trial is for the benefit of the defendant alone. The court  
16 further stated that even if the First and Fourteenth Amendments provided some right to the  
17 press and public to attend criminal trials, the defendant's right to a fair trial outweighed the  
18 "constitutional rights of the press and public." Here, the situation is even further removed  
19 from the public's right to be present at a public trial because the investigative materials  
20 support an on going search for additional information associated with alleged and uncharged  
21 criminal activity.  
22  
23  
24

25 In a Washington State case also involving a pretrial suppression hearing, the  
26 Washington Supreme Court determined that closing a pretrial suppression hearing and

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949 MARKET STREET, SUITE 334  
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temporarily sealing the court file was appropriate, especially in light of the conduct of the newspaper which demonstrated it would not abide by the bench-bar-press guidelines. Federated Publications, Inc. v. Kurtz, 94 Wn.2d 51, 615 P.2d 440 (1980). The decision acknowledges that the press is entitled to publish information gathered in *open* judicial proceedings under Wash. Const. Art.1, Section 10, however, the State and Federal Constitutions also require the trial judge to implement protective measures against the reasonable possibility of prejudicial publicity. Kurtz, 94 Wn.2d at 59-61. In Kurtz, the court found that Art.1, Section 22 "must at a minimum provide that an accused have an impartial jury free from outside influences and that the balance is never weighed against the accused, the public's right of access under section 10 must be interpreted in light of these requirements. Kurtz at 61, citations omitted. Our situation is even more compelling, in that here the defendant has not impeded the press's access to open public hearings, but rather seeks to ensure his right to a fair trial by an impartial jury.

Bench Press Bar Guidelines address these very concerns and provide:

2. The release of certain types of information by law enforcement personnel, the bench and the bar and publication thereof by news media generally tends to create dangers of prejudice without serving a significant law enforcement or public interest function. Therefore, all concerned should be aware of the dangers of prejudice in making pretrial public disclosures of the following:
  - (a) Opinion about a defendant's character, guilt or innocence,
  - (b) Admissions, confessions or the contents of statements or alibis attributable to a defendant

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949 MARKET STREET, SUITE 334  
TACOMA, WASHINGTON 98402  
(253) 798-6062 Facsimile 253-798-6715

- 1 (c) Opinions about the results of investigative procedures,  
2 such as fingerprints, polygraphs examinations, ballistic  
3 tests or laboratory tests.  
4 (d) Statements concerning the credibility or anticipated  
5 testimony of prospective witnesses.  
6 (e) Opinions concerning evidence or argument in the case,  
7 whether or not anticipated that such evidence or  
8 argument will be used at trial.

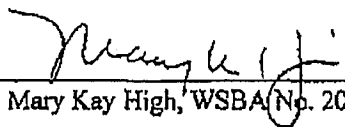
9 All of these types of prejudicial information and more are contained within the  
10 documents requested by the unidentified requestor.

### 11 CONCLUSION

12 Mr. Allen joins in defendant Hinton's and Mr. Davis's motion and also requests the  
13 court deny the request for all investigative materials generated in the Clemmons' criminal  
14 investigation. Mr. Allen urges the court to find the materials to be exempt from disclosure  
15 because the publicity that would flow from the publication of the materials would irreparably  
16 impair his ability to receive a fair trial by a fair and impartial jury.

17 Respectfully Submitted this 12<sup>th</sup> day of March, 2010.

18 DEPARTMENT OF ASSIGNED COUNSEL

19  
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21 By   
22 Mary Kay High, WSBA No. 20123  
23  
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DEPARTMENT OF ASSIGNED COUNSEL  
949 MARKET STREET, SUITE 334  
TACOMA, WASHINGTON 98402  
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